

**BOARD OF APPEALS
for
MONTGOMERY COUNTY**

Stella B. Werner Council Office Building
100 Maryland Avenue
Rockville, Maryland 20850
(240) 777-6600

www.montgomerycountymd.gov/content/council/boa/board.asp

Case No. S-2595

PETITION OF JOHN GIWI BAH

OPINION OF THE BOARD

(Opinion Adopted November 10, 2004)
(Effective Date of Opinion: April 28, 2005)

Case No. S-2595 is an application for a special exception pursuant to Section 59-G-2.00 (Accessory Apartment) of the Zoning Ordinance to permit an existing accessory apartment. The Hearing Examiner for Montgomery County held a public hearing on the application on September 13, 2004. The Petitioner failed to appear at the proceeding. On October 22, 2004, the Hearing Examiner issued a report and recommendation for denial of the special exception. The Hearing Examiner further recommended that if, the Petitioner demonstrates in the future that there have been substantial changes in the material facts and circumstances which resulted in his recommendation for denial, that the Board consider allowing refilling of the application in accordance with Section 59-A-4.126.

The subject property is Lot 18, Block C; located at 10304 New Hampshire Avenue, Silver Spring, Maryland, 20903, in the R-90 Zone

Decision of the Board of Appeals: Special Exception **Denied**.

The Board of Appeals considered the Hearing Examiner's Report and Recommendation at its Worksession on November 10, 2004. After careful consideration and a review of the record in the case, the Board finds that the report is comprehensive and well considered, and the Board adopts the Report and Recommendation and denies the special exception.

On a motion by Louise L. Mayer, seconded by Donna L. Barron, with Wendell M. Holloway and Allison Ishihara Fultz, Chair in agreement and Angelo

M. Caputo necessarily not participating, the Board adopted ;the following Resolution:

BE IT RESOLVED by the Board of Appeals for Montgomery County, Maryland that the opinion stated above is adopted as the Resolution required by law as its decision on the above-entitled petition.

Allison Ishihara Fultz
Chair, Montgomery County Board of Appeals

Entered in the Opinion Book
of the Board of Appeals for
Montgomery County, Maryland
this 28th day of April, 2005.

Katherine Freeman
Executive Secretary to the Board

NOTE:

Any request for rehearing or reconsideration must be filed within fifteen (15) days after the date the Opinion is mailed and entered in the Opinion Book (See Section 59-A-4.63 of the County Code). Please see the Board's Rules of Procedure for specific instructions for requesting reconsideration.

Any decision by the County Board of Appeals may, within thirty (30) days after the decision is rendered, be appealed by any person aggrieved by the decision of the Board and a party to the proceeding before it, to the Circuit Court for Montgomery County, in accordance with the Maryland Rules of Procedure.

**BEFORE THE MONTGOMERY COUNTY
BOARD OF APPEALS
Office of Zoning and Administrative Hearings
Stella B. Werner Council Office Building
Rockville, Maryland 20850
(240) 777-6660**

IN THE MATTER OF:
JOHN GIWI BAH
Petitioner

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S-2595

Board of Appeals Case No.

Daniel McHugh *
Kevin Martell *
Department of Housing and *
Community Affairs *

(OZAH Referral No. 04-25)

Eileen Finnegan, Authorized Representative *
Hillandale Citizens Association *
Opposed to the Petition *

Before: Martin L. Grossman, Hearing Examiner

HEARING EXAMINER’S REPORT AND RECOMMENDATION

TABLE OF CONTENTS

PAGE

I. STATEMENT OF THE CASE	5
II. FACTUAL BACKGROUND.....	6
A. The Subject Property	6
B. Proposed Use	10
C. The Neighborhood and its Character	12
D. Neighborhood Opposition.....	14
E. The Master Plan.....	14
III. SUMMARY OF HEARING.....	16
IV. FINDINGS AND CONCLUSIONS.....	17
A. Standard for Evaluation and Subject Site’s Non-inherent Adverse Effects	17

B. General Conditions	21
C. Specific Standards	25
D. Additional Applicable Standards	30
V. RECOMMENDATION	30

I. STATEMENT OF THE CASE

Petition No. S-2595, filed on November 14, 2003, seeks a special exception, pursuant to §59-G-2.00 of the Zoning Ordinance, to permit an accessory apartment use in a single-family residential structure located at 10304 New Hampshire Avenue, Silver Spring, Maryland. The subject property is designated Lot 18, Block C, in the Hillandale Subdivision of Silver Spring. It is zoned R-90, and the Tax Account Number is 0284493.

This matter was originally scheduled for a hearing on February 23, 2004 and was continued for 11 days to March 5, 2004, so that the housing inspector could testify. The Petition was opposed by the Hillandale Citizens Association (HCA) in letters dated February 13, 2004 (Exhibit 15) and July 12, 2004 (Exhibit 21). The subject property was inspected on March 1, 2004, by Housing Code Inspector, Daniel McHugh, whose memorandum of March 2, 2004, attached a four page list of housing code violations (Exhibit 19). The hearing was again postponed until July 16, 2004, at Petitioner's request so that he could assess whether he could afford necessary modifications.

On July 14, 2004, just two days before the scheduled hearing, the Hearing Examiner received a call from a friend of Mr. Bah, Beverly Ezeokoli, asking for another postponement because Mr. Bah was unavoidably detained in Africa. Ms. Ezeokoli was able to arrange a conference call with Petitioner and the Hearing Examiner. Based on Mr. Bah's oral assurance that he would be returning to the United States and wanted to pursue his petition, as well as Ms. Ezeokoli's written confirmation (Exhibit 22), the Hearing Examiner continued the case to September 13, 2004, at 10:30 a.m., with a notice (Exhibit 23) which specified that "no further continuances would be granted at [Petitioner's] request, absent a demonstration of an emergency warranting such action."

Technical Staff, on September 3, 2004, filed a lengthy report (Exhibit 24) recommending denial of the petition for a variety of reasons, one of them being that Petitioner has failed to correct a raft of housing code violations.¹ The hearing convened as scheduled on September 13, 2004, but neither Mr. Bah nor any representative appeared at the hearing or notified the Hearing Examiner of any difficulty in his appearing. The hearing proceeded in his absence because it had been duly noticed and the representative of the Citizens Association was present to testify, in addition to two Housing Code inspectors.

The Housing Code Inspector, Daniel McHugh, testified that when he re-inspected the Bah residence on September 9, 2004, four days before the hearing, he was admitted by an individual who told Mr. McHugh that Mr. Bah was at work.² Mr. McHugh told the individual that there was a hearing on September 13, 2004, and she told him that she would relay that fact to Mr. Bah. Tr. 9-10. Nevertheless, Mr. Bah did not appear.

At the hearing, testimony and exhibits were received from two Housing Code inspectors, Daniel McHugh and Kevin Martell, and from Eileen Finnegan, a representative of the Hillandale Citizens Association. The hearing was completed on the same day, but the Hearing Examiner kept the record open until September 24, 2004, to give Mr. Bah the opportunity to file something. Nothing further was received, and the record closed on

¹ The Technical Staff report is frequently quoted and paraphrased herein.

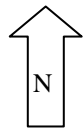
² Technical Staff apparently received a different story when they telephoned Mr. Bah's residence. The Hearing Examiner was advised by Zoning Supervisor Carlton Gilbert that he attempted to reach Mr. Bah by telephone prior to the hearing, but was told he was not yet back (presumably from Africa).

September 24, 2004.

II. FACTUAL BACKGROUND

A. The Subject Property

As noted above, the address of the subject property is 10304 New Hampshire Avenue in Silver Spring. The property's legal description is Block C, Lot 18, in the subdivision known as Hillandale (recorded as a re-subdivision on June 23, 1949 in Plat Book 35 as Plat No. 2350, MNCPPC # 130-24). The property is located on the west side of New Hampshire Avenue



between Overlook Drive and Oaklawn Drive, about 1200 feet northwest of the intersection of New Hampshire Avenue and Powder Mill Road near the Hillandale Shopping Center. Its location is depicted below in the vicinity map attached to the Technical Staff report.

The total area of the subject property is approximately 14,030 square feet, and it has a street frontage of 90 feet. Technical Staff indicates that the property was built in

S-2595 ACCESSORY APARTMENT



Map compiled on February 26, 2004 at 2:18 PM | Site located on base sheet no - 213NE02

1950, and the lot is irregularly shaped and fairly flat. The property is described by Technical Staff as a one-story brick house with attached garage (apparently converted in whole to other uses) and walkout basement; an existing accessory apartment in the basement, with two ground-level entrances off a rear patio; a deep, fenced rear yard; a fence in the front yard only along the southern property line; a stone pathway leading from the driveway around the (north) side of the house to the rear patio; four entryways (with numerous doors) along the front façade including the garage door; three doors along the rear façade – the two with direct entry into the apartment as previously noted and one off a wooden landing to the north; and a front yard that is almost entirely paved with asphalt or gravel except for a small unpaved area immediately in front of the house and another area in the front yard along the northern property line.

There are two curb cuts in the front yard, the northernmost, which is 17 feet wide, and the southernmost, which is about 15 feet wide. The portion of the paved area leading from the northernmost curb cut to the attached garage can accommodate two cars parked side by side. Approximately three more cars can be parked in the remaining paved area (a u-shaped drive, with extension), although Technical Staff does not count this for parking in order to preserve proper drive aisle circulation onto New Hampshire Avenue. Parking is only allowed on New Hampshire Avenue along the property frontage on Sundays, and thus Technical Staff does not count this as available parking either. There is a sidewalk that is about 3.5 feet wide but no tree panel along the front of the property.

A photo of the property taken by the Housing Code Inspector on March 1, 2004, is shown below (Exhibit 25(a)):

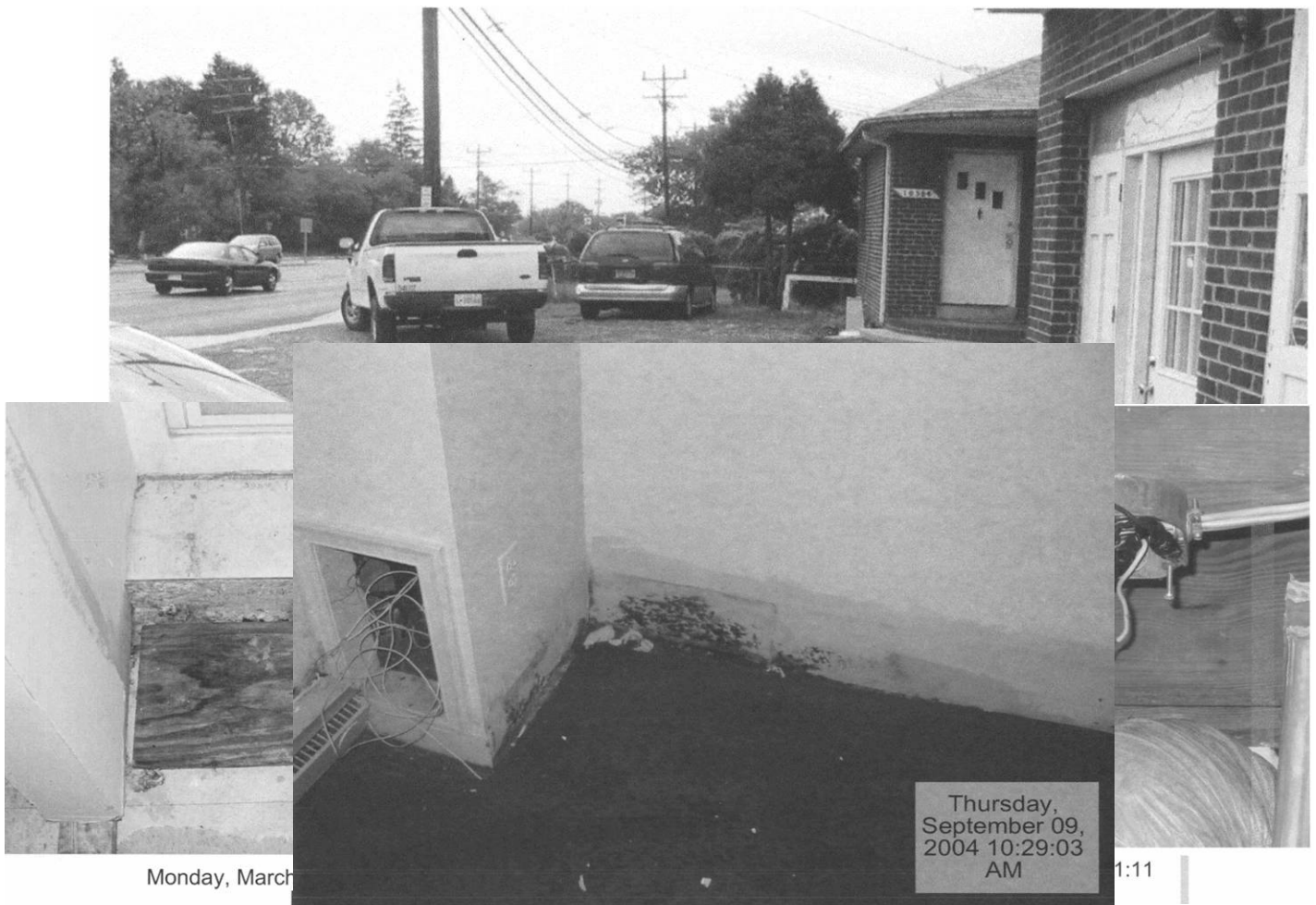
The property is subject to a permit for a registered home occupation, which the



Department of Permitting Services issued to Mr. Bah on August 13, 2002 (permit/license number 215242). The registered home occupation is a photography, videography, and music DJ business. The business is called "Bah John International." A sign permit was also issued for the registered home occupation, and the attached garage was converted to accommodate it. The registered home occupation permit (and sign permit) are still in force, and the applicant has not stipulated in writing that he intends to relinquish the registered home occupation if granted an accessory apartment special exception.

In a July 12, 2004, memorandum, a copy of which is attached to the Technical Staff report (Exhibit 24), the Department of Permitting Services indicated that Petitioner was in violation of Zoning Code §59-A-6.1(c)(9), a recently enacted zoning text amendment that imposes conditions on parking for registered home occupations. The violation could be remedied by the removal of excess pavement from the front yard and its replacement with green space. Mr. Bah agreed with the Department of Permitting Services Inspector to remove the sign and operate the business as a "no-impact home occupation," pending the results of the hearing before the Hearing Examiner. The following photo taken by the Housing Code Inspector on September 9, 2004, four days before the hearing, demonstrates that Petitioner has not removed excess pavement from the front of his house and replaced it with green space (Exhibit 28(a)):

Inspection of the subject premises on March 1, 2004, yielded a four page long list of Housing Code violations. A copy of that list was attached to the Inspector's March 2, 2004 memorandum (Exhibit 19), and is attached, as well, to this report. According to the



Monday, March

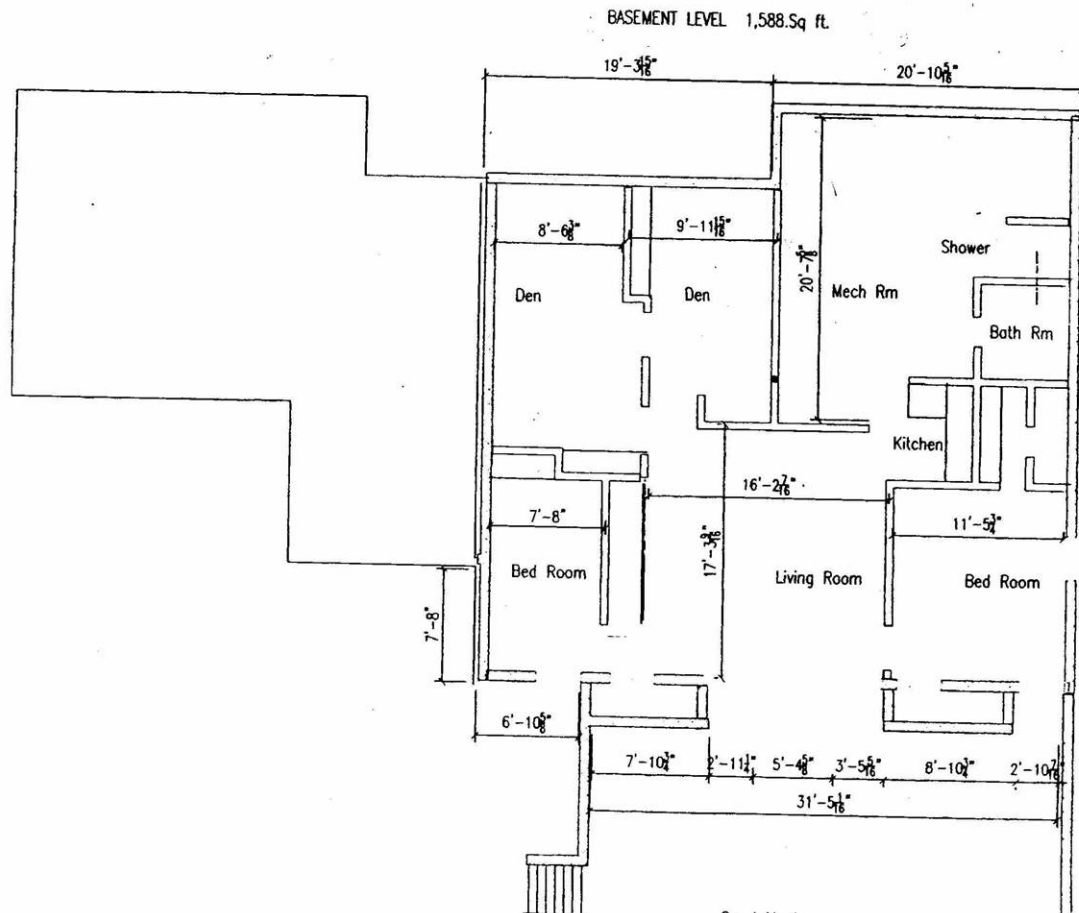
1:11

testimony of Housing Code Inspector McHugh, these violations have not been corrected, and the proposed accessory apartment is not fit for habitation at the present time. Tr. 19-20. A photo from each of the three inspections (March 1, July 12 and September 9, 2004) is shown below to illustrate the problem.

B. The Proposed Use

The proposed accessory apartment is located in the basement of the house and has a separate entrance on the rear of the home. It includes two bedrooms, two dens, a living room, a bathroom, a shower area and a kitchen area. The submitted floor plan indicates that the basement level has a floor area of 1,588 square feet, and the apartment a floor area of 1,080 square feet. Technical Staff's measurements from the floor plan indicate that the floor area of the apartment is 1298.5 square feet, including the mechanical/laundry room. The Housing Code Inspector calculated the habitable space as 687 square feet. Tr. 21-23. The floor plan for the basement, including the accessory apartment, is shown below (Exhibit 5).

According to the Housing Inspection Report dated March 2, 2004 (Exhibit 19), the rear right bedroom needs an egress window if it is to be used for sleeping. The report also noted that the dens could not be utilized for sleeping unless egress windows were installed. Access to the apartment's bathroom and shower room appears from the floor plan to be through the mechanical room.

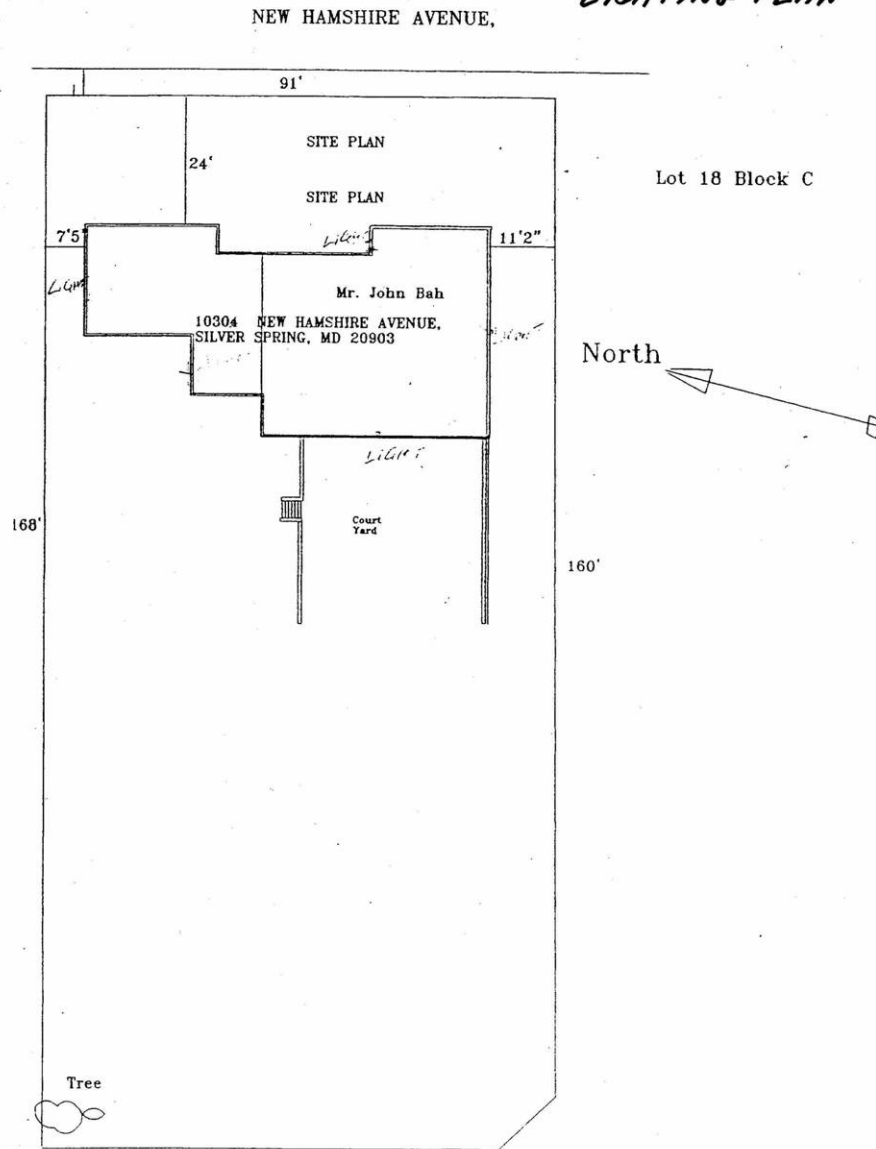


The Landscape and Lighting Plan (Exhibit 6) is identical to the Site Plan (Exhibit 4), except for notation of lighting locations. It is shown below.

Technical Staff found numerous deficiencies in the Site Plan and the Landscaping and Lighting Plan.

The site plan has the wrong lot configuration, has dimensions but no

**LANDSCAPE AND
LIGHTING PLAN**



scale, and is missing critical elements: fences, driveways, parking, all structures, pathways, stairways, sidewalks, decks, and building entrances. Site plans must show accurately all boundaries, dimensions, area, topography and frontage of the property, as well as the location and dimensions of all structures existing and proposed to be erected, the distances of such structures from the nearest property lines, and all walkways, driveways, patios, garden sheds, fences, and decks. A

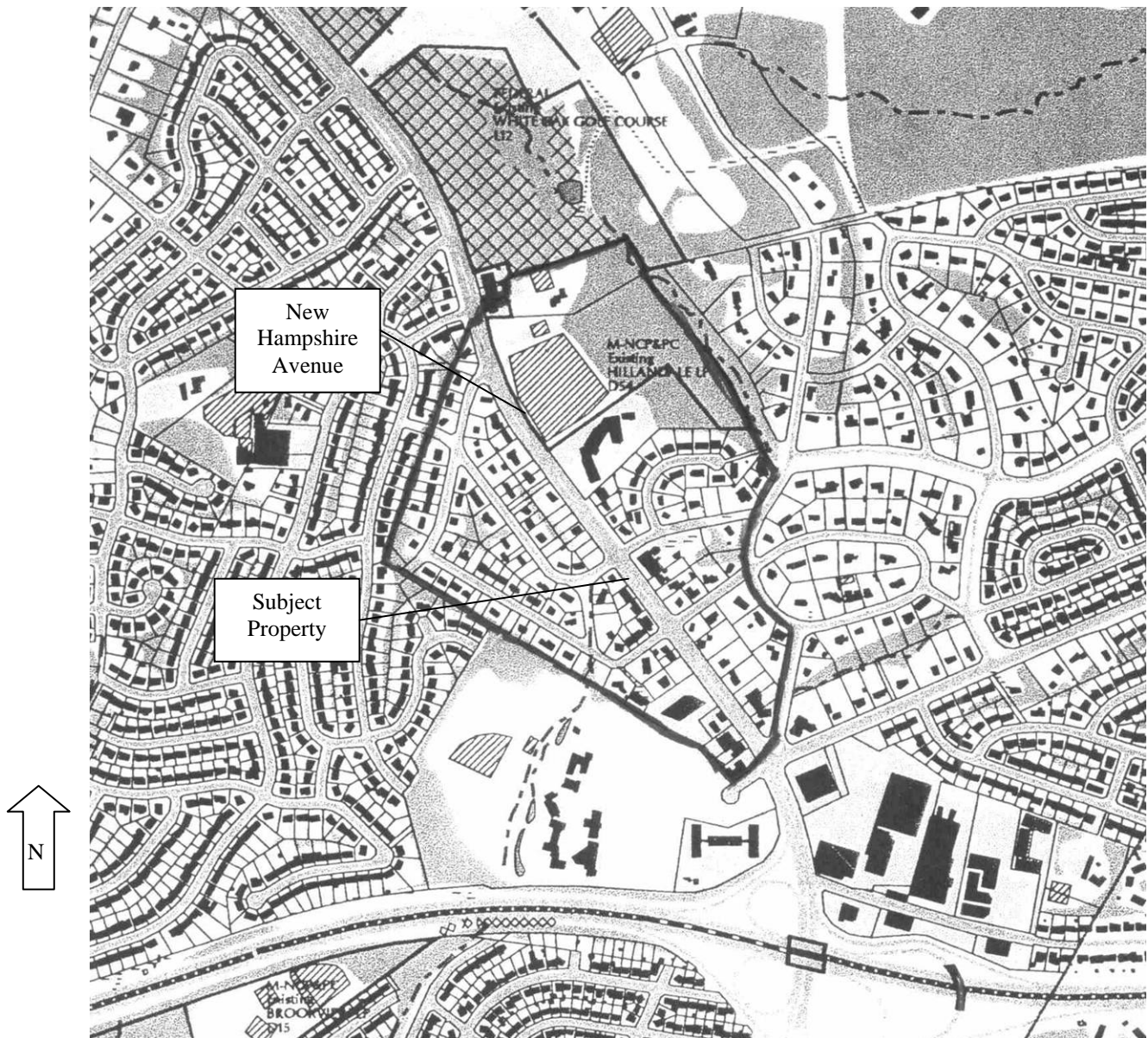
revised site plan must be to scale, show the scale, and indicate a north arrow.

The landscape plan is based on the site plan and thus has all of its deficiencies, plus no lighting is shown or described.³ The only landscaping shown is one tree in the rear of the property, and there appears to be more landscaping on site than that based on a site visit and submitted photos. A landscape and lighting plan must show complete information concerning the size, type, and location of any existing and proposed trees, landscaping, screening, and exterior illumination. For accessory apartment applications, information on lighting must include location, type, and wattage.

C. The Neighborhood and its Character

Technical Staff defined the neighborhood as that area within: on the north, the boundary of the R-90 zone; on the east, the eastern boundary of Hillandale Park (shown as a paper street, Edgewater Parkway, on the zoning map) and Greenacres Drive; on the south, Powder Mill Road; on the southwest, the rear property lines of properties fronting New Hampshire Avenue and Parkman Road; and on the northwest, the rear property lines of properties fronting Rodney Road. The area of the neighborhood as defined is about 105 acres. Technical Staff noted that the area of the Hillandale Citizen's Association is significantly larger than the neighborhood defined here. The Hearing Examiner accepts that definition, and the neighborhood is depicted below on a portion of the vicinity map attached to the Technical Staff report, with the boundaries of the neighborhood entered by the Hearing Examiner.

³ Actually, the Landscape and Lighting Plan did show the location of four lights; however, it does suffer from the other deficiencies noted by Technical Staff.



The neighborhood is zoned R-90 (Residential, One-family), except for a small portion toward the south, which is zoned C-T (Commercial, Transitional) and C-1 (Convenience Commercial), and a small portion in the north zoned C-O (Commercial, Office Building). The neighborhood, as described by Technical Staff, consists primarily of single-family residential homes, as well as the Hillandale Park, the Hillandale Elementary School, a fire station, a church, and some commercial uses. In addition, there are several special exception uses (dentist, non-resident medical practitioner's office, accessory apartments, and a gas station, among others), and, according to the

Hillandale Citizen's Association, a number of homes in the area also have front or rear yards that are almost entirely paved, which Technical Staff confirmed.

Technical Staff listed the following properties in the defined neighborhood that were the subject of special exception applications:

S-1884	Non-resident medical practitioner's office, 10408 New Hampshire Avenue, granted 11/22/91.
S-1498	Accessory apartment, 10300 New Hampshire Avenue, granted 2/1/88, adjacent to subject site.
S-2380	Accessory apartment, 10240 New Hampshire Avenue, granted 6/11/99, number shown incorrectly on zoning map as S-2280.
S-316/S-62	No information, but S-316-A is an Automobile filling station, 10206 New Hampshire Avenue, granted 10/24/86.
S-76	No information.
S-399	No information.
S-1296	Accessory Apartment, 10439 Naglee Road, dismissed 10/15/89.
S-1073	Accessory apartment, 10300 Naglee Road, granted 7/23/86.
A-5178	Variance for 1616 Overlook Drive, incorrectly posted as S-5178.

Technical Staff reports that, abutting the subject site to the south is a single-family home with an accessory apartment. Immediately abutting the subject site to the north is a single-family home that had a registered home occupation (with a sign announcing "Evelyn's Hair Salon/Notary Public), but whose owners recently told inspectors that they will be converting their home to a small group home, which is a use permitted by right. These owners recently paved over the entire front yard. The application shows the group home listed as "Benevolent Senior Home."

D. Neighborhood Opposition

Neighborhood opposition is represented by the Hillandale Citizens Association (HCA). In the two letters (Exhibits 15 and 21) Eileen Finnegan submitted on behalf of the HCA, she noted numerous problems with the subject property – the use of the front yard for parking, the multiple entries to the Bah home which do not give a residential appearance, the alleged use of the garage as "overnight accommodations," the excessive concentration of accessory apartments and rental homes in the neighborhood, the excessive concentration of home occupations, including Mr. Bah's business, Paradise Photography, in the area, and continuing enforcement issues that "make it more difficult to maintain our community's appearance and pride."

In testifying on behalf of the HCA (Tr. 24-36), Ms. Finnegan mentioned, in addition to the concerns raised in her letters, the scarcity of safe on-street parking in the area. For all these reasons the HCA opposed the subject Petition.

E. The Master Plan

The subject property is covered by the *1997 White Oak Master Plan*. The subject petition meets some recommendations of the Master Plan and fails to meet others. The property is zoned R-90 for single-family detached housing, and Zoning Code §59-C-1.31(a) permits accessory apartments by special exception in the R-90 Zone. The Master

Plan notes that the White Oak Master Plan area “offers a variety of housing,” and seeks to “continue to provide a variety of housing types.” Page 18. On the same page, the Plan recommends encouraging the development of “a variety of housing types for all income ranges.”

As noted by the Technical Staff, accessory apartments are a good source of affordable housing. Moreover, the Hearing Examiner takes official notice of a recent study by the MNCPPC concluding that

[accessory apartments] can be an excellent solution to the shortage of affordable housing by producing extra income for homeowners, dispersing the supply of moderate-cost housing more uniformly throughout the community, contributing to the tax base, reducing sprawl by providing more concentrated urban housing opportunities, and providing a means for extended family members to live together in a single site.

(Housing Montgomery: A Menu of Options for a Dramatic Increase in the Supply of Housing for our Workforce, 3/6/06, Montgomery County Planning Board Agenda Item #1)

However, the accessory apartment at issue in the subject case runs afoul of the Master Plan based on circumstances peculiar to this property.

“Protection of [the] existing residential communities is the main housing objective of the Plan” Page 6. In discussing Special Exceptions (page 24), the Plan’s stated objective is to “Evaluate New Requests for special exception uses and their impact on the character and nature of the residential neighborhoods in which they are proposed. The Plan recommends avoiding “[e]xcessive concentration of special exception uses and non-residential uses along major transportation corridors” because such sites “are more vulnerable to over-concentration. . . . This is especially a concern along New Hampshire Avenue, Randolph Road, and Powder Mill Road.”

Other specific Recommendations of the Plan are:

- *Require new requests for special exception uses along major transportation corridors and in residential communities to be compatible with their surroundings. Front yard setback should be maintained.*
- *Avoid front yard parking because of its commercial appearance. Side and rear parking should be screened from view of surrounding neighborhoods.*
- *Require new building or any modification or additions to existing buildings to be compatible with the character and scale of the adjoining neighborhood.*
- *Avoid placing large impervious areas in the Paint Branch watershed due to its environmental sensitivity.*

The subject Petition violates all of these recommendations. It adds to the concentration of special exception uses along a major transportation corridor, New Hampshire Avenue; it is not compatible with neighboring residences because of its excessive front yard paving and numerous doors, which create a commercial appearance; it has front yard parking; and contains a large impervious area in front of the house.

As a result, Technical Staff found the proposed use at the subject site to be inconsistent with the guidance in the *1997 White Oak Master Plan*. The Hearing Examiner agrees, but also notes that it is the site conditions, not the accessory apartment use itself, that makes this particular proposal inconsistent with the Master Plan.

III. SUMMARY OF HEARING

At the September 13, 2004 hearing, testimony was heard from Daniel McHugh and Kevin Martell, employees of the Department of Housing and Community Affairs, and from Eileen Finnegan, a Representative of the Hillandale Citizens Association. Petitioner did not appear.

1. Daniel McHugh (Tr. 6-22):

Daniel McHugh testified that he was with Housing Code Enforcement; that he initially inspected the subject premises on March 1, 2004; and that his March 2, 2004 report (Exhibit 19) contains the result of that inspection. According to Mr. McHugh, his inspection revealed the following:

There was numerous housing violations. The exterior, gutters being down, disrepair, walkways, trim needed to be painted, the driveway parking lot area was in disrepair. There were floor covering issues. There was no egress in some of the rooms that were occupied for sleeping. There was a real bad roach infestation within the unit. There were just deplorable conditions within this unit.

The 29 violations which were revealed during this inspection are listed in a four page attachment to his March 2 report.

Mr. McHugh re-inspected the premises on July 12, 2004, and found that although the gutters had been repaired and the trim painted, “[n]one of the interior violations had been corrected.” There was also debris outside the house that Petitioner was told to remove, and Mr. McHugh took some pictures of that debris outside the house on July 9, 2004. Exhibits 26 (a) and (b). Mr. McHugh followed up on July 28, 2004 and observed that the solid waste had been removed from outside the subject property.

Mr. McHugh again inspected the premises on September 9, 2004. He testified that Mr. Bah was not there, but he was admitted by an individual who told Mr. McHugh that Mr. Bah was at work. Mr. McHugh told the individual that there was a hearing on September 13, 2004, and she told him that she would relay that fact to Mr. Bah. Tr. 9-10.

Mr. McHugh then identified the numerous pictures he had taken on his three inspections of the subject property. The March 1, 2004 pictures were admitted as Exhibits 25(a) through (jj); the July 12 pictures were admitted as Exhibits 27 (a) through (m); and the September 9 pictures were admitted as Exhibits 28 (a) through (i). In his recollection, the housing code problems he found inside the subject house on July 12 and September 9, were the same that existed all the way back to his original inspection in March. When asked by the Hearing Examiner whether the premises he inspected were “fit for habitation,” Mr. McHugh testified, “Not at the present time.”

Finally, Mr. McHugh testified that the usable space in the accessory apartment was 687 square feet.

2. Kevin Martell (Tr. 22-24):

Kevin Martell testified that the proposed accessory apartment was subordinate in size to the rest of the home. He testified that the apartment, as it currently exists, does not meet housing code standards for occupation as an accessory apartment.

Mr. Martell further testified that Petitioner had been, but no longer was, renting out space in the converted garage, and that the whole front yard is still being used as a parking lot.

3. Eileen Finnegan (Tr. 24-36):

Eileen Finnegan testified as a representative of the Hillandale Citizens Association. She stated that:

our association has been trying to work to maintain and keep up a section of New Hampshire Avenue, which is sadly having some difficulties and Mr. Bah's house, unfortunately, is the poster child for how bad a property can look and it really has affected adjoining properties so that our concerns are several.

Ms. Finnegan testified about other special exceptions nearby to Mr. Bah's residence, and suggested that there was an over-concentration in the area. Her second "huge concern" was the appearance of the property. She then identified photos which were admitted as Exhibits 29 (a) through (g). Ms Finnegan observed that there is no landscaping to screen the cars parked in front, and "it is not only unattractive it's quite nasty."

Ms. Finnegan also expressed HCA's concern about the additional parking requirements that Mr. Bah might generate, and she demonstrated with photos the scarcity of safe parking on the nearby streets. She noted that she had been working both with zoning code enforcement and housing code enforcement for over two years, that the HCA was trying to improve that part of the community and that it therefore opposed this accessory apartment.

The Hearing Examiner held the record open for eleven days after the hearing to give Petitioner an opportunity to amplify the record, but there were no additional filings.

IV. FINDINGS AND CONCLUSIONS

A special exception is a zoning device that authorizes certain uses provided that pre-set legislative standards are met, that the use conforms to the applicable master plan, and that it is compatible with the existing neighborhood. Each special exception petition is evaluated in a site-specific context because a given special exception might be appropriate in some locations but not in others. The zoning statute establishes both general and specific standards for special exceptions, and the Petitioner has the burden of proof to show that the proposed use satisfies all applicable general and specific standards. Technical Staff concluded that Petitioner has not satisfied the requirements to obtain the special exception (Exhibits 24).

Weighing all the testimony and evidence of record under a "preponderance of the evidence" standard (Code §59-G-1.21(a)), the Hearing Examiner also concludes that the instant petition meets some, but not all, of the general and specific requirements for the proposed use.

A. Standard for Evaluation and Subject Site's Non-inherent Adverse Effects

The standard for evaluation prescribed in Code § 59-G-1.21 requires consideration of the inherent and non-inherent adverse effects on nearby properties and the general neighborhood from the proposed use at the proposed location. Inherent adverse effects are “the physical and operational characteristics necessarily associated with the particular use, regardless of its physical size or scale of operations.” Code § 59-G-1.21. Inherent adverse effects, alone, are not a sufficient basis for denial of a special exception. Non-inherent adverse effects are “physical and operational characteristics not necessarily associated with the particular use, or adverse effects created by unusual characteristics of the site.” *Id.* Non-inherent adverse effects, alone or in conjunction with inherent effects, are a sufficient basis to deny a special exception.

Technical Staff have identified seven characteristics to consider in analyzing inherent and non-inherent effects: size, scale, scope, light, noise, traffic and environment. For the instant case, analysis of inherent and non-inherent adverse effects must establish what physical and operational characteristics are necessarily associated with an accessory apartment. Characteristics of the proposed accessory apartment that are consistent with the “necessarily associated” characteristics of accessory apartments will be considered inherent adverse effects, while those characteristics of the proposed use that are not necessarily associated with accessory apartments, or that are created by unusual site conditions, will be considered non-inherent effects. The inherent and non-inherent effects thus identified must then be analyzed to determine whether these effects are acceptable or would create adverse impacts sufficient to result in denial.

Technical Staff lists the following inherent characteristics of accessory apartments:

the existence of the apartment as a separate entity from the main living unit but sharing a party wall with the main unit.; the provision within the apartment of the necessary facilities and spaces and floor area to qualify as a habitable space under the Building Code; provision of a separate entrance and walkway, and sufficient lighting; provision of sufficient parking; the existence of an additional household on the site; additional activity from that household, including more use of the outdoor space and more pedestrian, traffic, and parking activity; the potential for additional noise from that additional household; additional generation of garbage; additional demand on well and septic facilities if there are such; and additional demand on public facilities.

The Hearing Examiner concludes that, in general, an accessory apartment has characteristics similar to a single family residence, with only a modest increase in traffic, parking and noise that would be consistent with a larger family occupying a single family residence. Thus, the inherent effects of an accessory apartment would include the fact that an additional resident (or residents) will be added to the neighborhood, with the concomitant possibility of an additional vehicle or two. Unfortunately, there are unusual characteristics of the site in its present condition which create non-inherent adverse effects on the neighborhood.

In addition to the numerous housing code violations, Technical Staff summarized “other serious issues” as:

excessive intensity of use on the property due to the existence of a registered home occupation permit for the property, location of parking within the front yard, inadequate landscaping in the front yard, compromised residential appearance due to existing alterations to the front facades (i.e. numerous doors), insufficiency of submitted plans (no survey plan, improper configuration of lot), lack of information about the ultimate number of bedrooms and hence occupancy in the apartment, excessive size of the apartment, other burden of proof issues, and lack of master plan conformance

In the opinion of Technical Staff, these violations should be viewed as pre-existing conditions that have already compromised neighborhood compatibility and public safety, and therefore, non-inherent adverse effects. “[T]he sheer number and type of violations make staff believe that remedy of these violations on the house and property should be a precedent condition, not an antecedent condition of approval for the special exception. Without such precedent condition, staff cannot justifiably make findings that neighborhood compatibility would exist or public safety be maintained.” The Hearing Examiner agrees.

Technical Staff also expressed concerns about Petitioner having an active permit for a registered home occupation, at the same time as he is applying for an accessory apartment. Staff felt that the combination of a single-family home, an accessory apartment and a registered home occupation, is too intense for the site in terms of on-site activity, traffic generation and parking, and thus is not compatible or in harmony with the neighborhood. The Hearing Examiner also recognizes this situation as a source of concern. If it were the only problem, it could be dealt with by a conditional grant of the special exception, since Petitioner orally advised Technical Staff that he no longer operates the registered home occupation. It is, of course, not the only problem.

Technical Staff listed 10 reasons for recommending denial of the Petition:

1. The floor area of the apartment (including the shared laundry and mechanical room) is approximately 1298.5 square feet and thus exceeds the maximum allowable 1200 square feet. (See 59-G-2.00(a)(9).)
2. The applicant has not met his burden of proof to establish that there is adequate parking, because parking demand cannot be adequately estimated for reasons discussed in the staff report. (See 59-G-2.00(c)(3) and 59-G-1.21(c).)
3. The parking area is within the front yard, contrary to the accessory apartment requirement that the parking area is allowed to be in a driveway but otherwise not in the front yard. (See 59-G-2.00(c)(3).) (Note also that the property has a permit for a registered home occupation and the parking area also does not conform with registered home occupation parking area requirements. See 59-6.1(c)(8) and (9).)

4. Landscaping within the front yard is unsuitable and inadequate because there is excessive paving and too little green area to maintain a residential appearance. (See 59-G-1.26.)
5. The submitted site plan and landscape and lighting plan are inadequate to allow staff to make requisite findings, primarily because the lot shape is inaccurate, the plans do not show the scale, no parking layout is shown, exterior lighting information is missing, certain existing landscaping is missing, and no landscaping or screening for the parking is shown. Therefore, the applicant has not met his burden of proof. (See 59-G-1.21(c).)
6. The submitted floor plan is inadequate to allow staff to make requisite findings. The plan does not clearly show the location of the entrances to the apartment, including both from the outside and from the upstairs. Therefore, the applicant has not met his burden of proof. (See 59-G-1.21(c).)
7. The number of doors along the front façade compromises the residential appearance, although it is not clear if these doors (particularly the modified garage door) were added to accommodate the registered home occupation or the accessory apartment. (See 59-G-1.23(h) and 59-G-2.00(a)(6) and (7).)
8. The combination of uses on the site, namely single-family home, accessory apartment, and registered home occupation, is too intense for the site in terms of on-site activity and parking, and thus is not compatible or in harmony with the neighborhood. . . . (See 59-G-1.21(a)(4) and (5).)
9. There are numerous violations on this site, the existence of which staff finds clouds disposition of this case, for various reasons. . . . (See 59-G-1.21(a)(4), 59-G-1.21(a)(8), 59-G-1.21(c), and 59-G-2.00(c)(3), and 59-G-1.2.)
10. The accessory apartment is not consistent with the *White Oak Master Plan (March 1997)*, for reasons discussed in the staff report.

The Hearing Examiner cannot agree with the first reason for denial listed by Technical Staff because the testimony of Housing Code Inspectors, which was not available to Technical Staff when their report was prepared, contradicts it. The Housing Code Inspectors testified that the accessory apartment had 687 square feet of habitable space, and that it was subordinate to the main dwelling. Tr. 20 - 22. Instead of Technical Staff's reason number one, the Hearing Examiner would substitute the fact that no affidavit of posting has been filed, as is required by Zoning Code §59-A-4.43(b).

Based on the evidence in this case, and considering size, scale, scope, light, noise, traffic and environment, the Hearing Examiner concludes, as did the Technical Staff, that in this case, there are non-inherent adverse effects from the proposed use which would require denial of the petition. It should be emphasized that this conclusion is not being reached solely because Petitioner has not corrected housing code violations. The past practice has been to allow a special exception for an accessory apartment, if it is

otherwise appropriate, subject to correction of housing code violations. In fact, Housing Code Inspector McHugh advised Mr. Bah on March 2, 2004, not to make corrections until after the hearing then scheduled for March 5, 2004, a few days later (Exhibit 20).⁴ The problem is that there are so many serious housing code violations and other deficiencies in the subject property (e.g. the excessive paving of the front yard) that these deficiencies impact on the health and safety of any accessory apartment tenant as well as on the residential quality of the neighborhood.

B. General Conditions

The general standards for a special exception are found in Zoning Code §59-G-1.21(a). The Technical Staff report, the Housing Code Inspector's report, the exhibits in this case and the testimony of the Housing Code Inspectors and the HCA provide ample evidence that the general standards would not be satisfied in this case.

Sec. 59-G-1.21. General conditions.

§5-G-1.21(a) *-A special exception may be granted when the Board, the Hearing Examiner, or the District Council, as the case may be, finds from a preponderance of the evidence of record that the proposed use:*

(1) Is a permissible special exception in the zone.

Conclusion: An accessory apartment is a permissible special exception in the R-90 Zone, pursuant to Code § 59-C-1.31.

(2) Complies with the standards and requirements set forth for the use in Division 59-G-2. The fact that a proposed use complies with all specific standards and requirements to grant a special exception does not create a presumption that the use is compatible with nearby properties and, in itself, is not sufficient to require a special exception to be granted.

Conclusion: Petitioner has failed to establish that the proposed use complies with the specific standards set forth in § 59-G-2.00 for an accessory apartment, as outlined in Part C, below.

(3) Will be consistent with the general plan for the physical development of the District, including any master plan adopted by the Commission. Any decision to grant or deny special exception must be consistent with any recommendation in a master plan regarding the appropriateness of a special exception at a

⁴ In the Hearing Examiner's opinion, it is not a good practice for a Housing Code Inspector to tell someone with serious housing code violations to postpone taking corrective action until after a special exception hearing. Where the infractions do not threaten health and safety and bear only on the completion of an accessory apartment which is not currently in use, it might be fair to tell a petitioner that corrections may be made after the special exception hearing because, if the special exception is not granted, the petitioner might elect not to complete the apartment.

particular location. If the Planning Board or the Board's technical staff in its report on a special exception concludes that granting a particular special exception at a particular location would be inconsistent with the land use objectives of the applicable master plan, a decision to grant the special exception must include specific findings as to master plan consistency.

Conclusion: The subject property is covered by the *1997 White Oak Master Plan*. The Plan recommends encouraging the development of “a variety of housing types for all income ranges.” Accessory apartments are a good source of affordable housing; however, the accessory apartment at issue in the subject case runs afoul of the Master Plan based on circumstances peculiar to this property.

“Protection of [the] existing residential communities is the main housing objective of the Plan” The Plan recommends avoiding “[e]xcessive concentration of special exception uses and non-residential uses along major transportation corridors,” such as New Hampshire Avenue. Other specific Recommendations of the Plan are:

- *Require new requests for special exception uses along major transportation corridors and in residential communities to be compatible with their surroundings. Front yard setback should be maintained.*
- *Avoid front yard parking because of its commercial appearance. Side and rear parking should be screened from view of surrounding neighborhoods.*
- *Require new building or any modification or additions to existing buildings to be compatible with the character and scale of the adjoining neighborhood.*
- *Avoid placing large impervious areas in the Paint Branch watershed due to its environmental sensitivity.*

The subject Petition violates all of these recommendations. It adds to the concentration of special exception uses along a major transportation corridor, New Hampshire Avenue; it is not compatible with neighboring residences because of its excessive front yard paving and numerous doors, which create a commercial appearance; it has front yard parking; and it contains a large impervious area in front of the house.

Thus, the Hearing Examiner concludes that given the particular site conditions, the planned use is not inconsistent with the goals and objectives of the *1997 White Oak Master Plan*. Technical Staff reached the same conclusion.

- (4) *Will be in harmony with the general character of the neighborhood considering population density, design, scale and bulk of any proposed new structures, intensity and character of activity, traffic and parking conditions, and number of similar uses.*

Conclusion: For all the reasons stated in Part IV.A. of this report, the Hearing Examiner finds that the intended use, given present site conditions, will not be in harmony with the general character of the neighborhood.

- (5) *Will not be detrimental to the use, peaceful enjoyment, economic value or development of surrounding properties or the general neighborhood at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.*

Conclusion: Given the pre-existing violations on the property and structure, the excess paving, the insufficient landscaping, and the potentially high demand for on-site parking, the Hearing Examiner finds that the proposed use will be detrimental to the use, peaceful enjoyment, economic value, or development of surrounding residential properties or the general neighborhood.

- (6) *Will cause no objectionable noise, vibrations, fumes, odors, dust, illumination, glare, or physical activity at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.*

Conclusion: There is no evidence that the accessory apartment will cause objectionable noise, vibrations, fumes, odors, dust, illumination, glare, or physical activity, and the Hearing Examiner so finds.

- (7) *Will not, when evaluated in conjunction with existing and approved special exceptions in any neighboring one-family residential area, increase the number, intensity, or scope of special exception uses sufficiently to affect the area adversely or alter the predominantly residential nature of the area. Special exception uses that are consistent with the recommendations of a master or sector plan do not alter the nature of an area.*

Conclusion: There are eight other special exceptions in the neighborhood, according to the Technical Staff report. Technical Staff did not feel that the proposed use would increase the number, intensity or scope of special exception uses sufficiently to adversely affect the area. The Hearing Examiner disagrees. Based on the letters and testimony of the Hillandale Citizens Association, as well as the evidence of unusual site conditions here, the Hearing Examiner finds that the proposed special

exception would increase the intensity of special exception uses sufficiently to affect the area adversely.

- (8) *Will not adversely affect the health, safety, security, morals or general welfare of residents, visitors or workers in the area at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.*

Conclusion: The evidence supports the conclusion that, given the ongoing housing code violations, the proposed use would adversely affect the health, safety, security, morals or general welfare of residents, visitors or workers in the area at the subject site.

- (9) *Will be served by adequate public services and facilities including schools, police and fire protection, water, sanitary sewer, public roads, storm drainage and other public facilities.*

Conclusion: The evidence supports the conclusion that the proposed special exception would be adequately served by the specified public services and facilities.

- (i) *If the special exception use requires approval of a preliminary plan of subdivision, the adequacy of public facilities must be determined by the Planning Board at the time of subdivision review. In that case, subdivision approval must be included as a condition of the special exception. If the special exception does not require approval of a preliminary plan of subdivision, the adequacy of public facilities must be determined by the Board of Appeals when the special exception is considered. The adequacy of public facilities review must include the Local Area Transportation Review and the Policy Area Transportation Review, as required in the applicable Annual Growth Policy.*

Conclusion: The special exception sought in this case would not require approval of a preliminary plan of subdivision. Therefore, the public facilities review must include analysis of the Local Area Transportation Review (“LATR”).⁵ The Technical Staff did do such a review, and concluded that the proposed accessory apartment use would add one additional

⁵ The Policy Area Transportation Review (PATR) was abolished as of July 1, 2004, pursuant to the FY 2003-5 Annual Growth Policy (AGP) – Policy Element.

trip during each of the peak hour weekday periods. Since the existing house, combined with the proposed accessory apartment, would generate fewer than 30 total trips in the weekday morning and evening peak hours, the requirements of the LATR are satisfied without a traffic study. See the July 2004 LATR Guidelines, of which the Hearing Examiner takes official notice. Therefore, the Technical Staff concludes, as does the Hearing Examiner, that the instant petition meets the LATR.

- (ii) *With regard to findings relating to public roads, the Board, the Hearing Examiner, or the District Council, as the case may be, must further determine that the proposal will have no detrimental effect on the safety of vehicular or pedestrian traffic.*

Conclusion: Based on the evidence of record, especially the Transportation Staff's finding that there is adequate sight distance at the property driveway to allow safe exiting, the Hearing Examiner concludes that the proposed use will not reduce the safety of vehicular or pedestrian traffic.

* * *

§5-G-1.21(c) *The applicant for a special exception has the burden of proof to show that the proposed use satisfies all applicable general and specific standards under this Article. This burden includes the burden of going forward with the evidence, and the burden of persuasion on all questions of fact.*

Conclusion: The Petitioner, by failing to appear at the hearing, failed to meet his burden of going forward with the evidence and his burden of persuasion on all questions of fact.

C. Specific Standards

The testimony and the exhibits of record, especially the Technical Staff Report (Exhibit 24), provide sufficient evidence that the specific standards required by Section 59-G-2.00 have not been satisfied in this case, as described below.

Sec. 59-G-2.00. Accessory apartment.

A special exception may be granted for an accessory apartment on the same lot as an existing one-family detached dwelling, subject to the following standards and requirements:

(a) Dwelling unit requirements:

- (1) Only one accessory apartment may be created on the same*

lot as an existing one-family detached dwelling.

Conclusion: Only one accessory apartment is proposed.

(2) The accessory apartment must have at least one party wall in common with the main dwelling on a lot of one acre (43,560 square feet) or less. On a lot of more than one acre, an accessory apartment may be added to an existing one-family detached dwelling, or may be created through conversion of a separate accessory structure already existing on the same lot as the main dwelling on December 2, 1983. An accessory apartment may be permitted in a separate accessory structure built after December 2, 1983, provided:

- (i) The lot is 2 acres or more in size; and*
- (ii) The apartment will house a care-giver found by the Board to be needed to provide assistance to an elderly, ill or handicapped relative of the owner-occupant.*

Conclusion: The apartment is located in the basement of the house, and therefore shares a wall in common, as required for a lot of this size (under an acre).

(3) An addition or extension to a main dwelling may be approved in order to add additional floor space to accommodate an accessory apartment. All development standards of the zone apply. An addition to an accessory structure is not permitted.

Conclusion: No addition or extension of the main dwelling is proposed.

(4) The one-family detached dwelling in which the accessory apartment is to be created or to which it is to be added must be at least 5 years old on the date of application for special exception.

Conclusion: The original house was built in 1951. It therefore meets the “5 year old” requirement.

(5) The accessory apartment must not be located on a lot:

- (i) That is occupied by a family of unrelated persons; or*
- (ii) Where any of the following otherwise allowed residential uses exist: guest room for rent, boardinghouse or a registered living unit; or*
- (iii) That contains any rental residential use other than an accessory dwelling in an agricultural zone.*

Conclusion: Since Petitioner did not appear to testify, it is unclear who is living on the premises now and whether there are other residential uses. Thus, Petitioner has failed to meet his burden of going forward with the evidence and his burden of persuasion on this point.

(6) *Any separate entrance must be located so that the appearance of a single-family dwelling is preserved.*

Conclusion: Although access to the accessory apartment is through a back door to the basement, there are numerous entrances along the front of the property, thereby compromising the residential appearance of the property.

(7) *All external modifications and improvements must be compatible with the existing dwelling and surrounding properties.*

Conclusion: No external modifications are proposed.

(8) *The accessory apartment must have the same street address (house number) as the main dwelling.*

Conclusion: The accessory apartment will have the same address as the main dwelling.

(9) *The accessory apartment must be subordinate to the main dwelling. The floor area of the accessory apartment is limited to a maximum of 1,200 square feet.*

Conclusion: Based on the measurements of the Housing Code Inspectors, the Hearing Examiner finds that the accessory apartment is subordinate to the main dwelling, and occupies less than 1,200 square feet.

59-G § 2.00(b) Ownership Requirements

(1) *The owner of the lot on which the accessory apartment is located must occupy one of the dwelling units, except for bona fide temporary absences not exceeding 6 months in any 12-month period. The period of temporary absence may be increased by the Board upon a finding that a hardship would otherwise result.*

Conclusion: Technical Staff states that Petitioner, who is the owner, will occupy one of the dwelling units. Since there is no evidence to the contrary, the Hearing Examiner so finds.

(2) *Except in the case of an accessory apartment that exists at the time of the acquisition of the home by the Petitioner, one year must have elapsed between the date when the owner purchased the property (settlement date) and the date when the special exception becomes effective. The Board may waive this*

requirement upon a finding that a hardship would otherwise result.

Conclusion: The Petitioner acquired the property in 1999 according to Technical Staff's report of the state taxation records. Based on this evidence, the Hearing Examiner concludes that Petitioner acquired the property more than one year before the filing of the petition in 2003.

- (3) *Under no circumstances, is the owner allowed to receive compensation for the occupancy of more than one dwelling unit.*

Conclusion: Since Petitioner did not appear to testify, it is unclear who is living on the premises now and whether the Petitioner will receive compensation for only one dwelling unit. Thus, Petitioner has failed to meet his burden of going forward with the evidence and his burden of persuasion on this point.

- (4) *For purposes of this section owner means an individual who owns, or whose parent or child owns, a substantial equitable interest in the property as determined by the Board.*

Conclusion: The Petitioner is the owner of the property.

- (5) *The restrictions under (1) and (3) above do not apply if the accessory apartment is occupied by an elderly person who has been a continuous tenant of the accessory apartment for at least 20 years.*

Conclusion: Not applicable

59-G § 2.00(c) Land Use Requirements

- (1) *The minimum lot size must be 6,000 square feet, except where the minimum lot size of the zone is larger. A property consisting of more than one record lot, including a fraction of a lot, is to be treated as one lot if it contains a single one-family detached dwelling lawfully constructed prior to October, 1967. All other development standards of the zone must also apply, including setbacks, lot width, lot coverage, building height and the standards for an accessory building in the case of conversion of such a building.*

Conclusion: The subject lot is approximately 14,030 square feet in size. Petitioner failed to submit information sufficient for Technical Staff to determine whether the subject site meets all applicable development standards. Thus, Petitioner has failed to meet his burden of going forward with the evidence and his burden of persuasion on this point.

- (2) *An accessory apartment must not, when considered in combination with other existing or approved accessory apartments, result in excessive concentration of similar uses, including other special exception uses, in the general neighborhood of the proposed use(see also section G-1.21 (a)(7) which concerns excessive concentration of special exceptions in general).*

Conclusion: Technical Staff found only four other properties in the defined neighborhood that were the subject of accessory apartment special exception applications. Therefore, there is no excessive concentration of accessory apartment uses in this area.

- (3) *Adequate parking must be provided. There must be a minimum of 2 off-street parking spaces unless the Board makes either of the following findings:*

- (i) *More spaces are required to supplement on-street parking; or*
- (ii) *Adequate on-street parking permits fewer off-street spaces.*

Off-street parking spaces may be in a driveway but otherwise must not be located in the yard area between the front of the house and the street right-of-way line.

Conclusion: It is unclear whether adequate parking is provided because Technical Staff lacks information to estimate parking demand. Some of the on-site parking is within the front yard, contrary to requirements. On-street parking is not available to supplement on-site parking. Thus, Petitioner has failed to meet his burden of going forward with the evidence and his burden of persuasion on this point.

59-G § 2.00(d) Data to accompany application.

The Board may waive for good cause shown any of the data required to accompany an application for special exception upon written request of the applicant. The Board may accept plans or drawings prepared by the applicant so long as they are substantially to scale and provide information the Board determines is adequate

Conclusion: Technical Staff notes that it received an application with a site plan, landscaping plan, and floor plan that were inadequate in that they were not to scale and did not provide needed information. Thus, Petitioner has failed to meet his burden of going forward with the evidence and his burden of persuasion on this point.

D. Additional Applicable Standards

Not only must an accessory apartment comply with the zoning requirements as set forth in 59-G, it must also be approved for habitation by the Department of Housing and Community Affairs. As discussed in Part II. B. of this Report, the Housing Code Inspector's report attached a four page list of housing code violations. That list is attached to this report. The Housing Code Inspector testified that these violations remained as of his last inspection, four days before the hearing.

V. RECOMMENDATION

Based on the foregoing analysis, I recommend that Petition No. S-2595 for a special exception for an accessory apartment located at 10304 New Hampshire Avenue, Silver Spring, be DENIED. I further recommend that, if Petitioner demonstrates in the future that there have been substantial changes in the material facts and circumstances which resulted in a recommendation of denial in the original hearing, the Board should consider allowing refiling by Petitioner, in accordance with Zoning Code §59-A-4.126.

Dated: October 22, 2004

Respectfully submitted,

Martin L. Grossman
Hearing Examiner